(1)

Supreme Court, U.S.
FILED

No. 94-527 SEP 19 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHARLES BELLA,
Petitioner,

v.

LEE CHAMBERLAIN and CURTIS MEYERS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH E. SIMPSON
(Counsel of Record)
TOMITA & SIMPSON, P.C.
4253 Montgomery Blvd., NE
Albuquerque, NM 87109
(505) 883-4993

BRAD D. HALL
KATHRYN HAMMEL
GADDY & HALL
2025 San Pedro Dr., NE
Albuquerque, NM 87110
(505) 254-9090

MICHAEL B. BROWDE
1117 Stanford, NE
Albuquerque, NM 87106
(505) 277-5326
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

50 pp

QUESTIONS PRESENTED

1. Whether police conduct actionable under the Fourth Amendment in a civil action for damages encompasses only conduct occurring at the moment of seizure, as defined by *California v. Hodari D.*, 499 U.S. 621 (1991), or all police conduct applied to effect an arrest, investigatory stop or other seizure of a free citizen as defined by *Graham v. Connor*, 490 U.S. 386 (1989)?

2. Whether the intentional use of deadly force against an innocent hostage states a civil rights claim against a federal police officer under the Fifth Amendment?

3. Whether this Court's qualified immunity jurisprudence, as applied in Fourth and Fifth Amendment cases, must be clarified to require a factual record as a predicate to the determination of the excessiveness of force?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Tenth Circuit's Reliance on the Narrow "Seizure" Standard of *California v. Hodari D.*, 499 U.S. 621 (1991) to Deny Petitioner's Fourth Amendment Claim Conflicts With This Court's Opinion in *Graham v. Connor*, 490 U.S. 386 (1989) and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court Because It Is Confounding the Lower Courts and Has Led to Serious Conflicts Among the Circuits	6
II. The Tenth Circuit's Failure to Acknowledge That the Intentional Use of Deadly Force Against an Innocent Hostage States a Claim Against Federal Police Officers Under the Fifth Amendment, Is in Conflict With the Decisions of Other Federal Courts of Appeals on the Same Matter, and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	12

TABLE OF CONTENTS—Continued

Page

III. The Tenth Circuit's Improper Weighing of the Evidence Alleged in the Complaint to Determine That "the Potentially Deadly Force" Used in This Case Was Not "Grossly Disproportionate to the Need Presented," Is in Conflict With Decisions of Other Federal Courts of Appeals on the Same Subject, and Demonstrates Why This Court's Qualified Immunity Jurisprudence Must Be Clarified to Require a Factual Record as a Predicate to the Determination of a Qualified Immunity Defense Against a Claim Under the Fourth or Fifth Amendment 15

CONCLUSION 19

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: Page

Alexander v. City and County of San Francisco, —— F.3d ——, 1994 WL 321757 (9th Cir. 1994) 11, 17
Anderson v. Creighton, 483 U.S. 635 (1987) 16, 17
Austin v. Hamilton, 945 F.2d 1155 (10th Cir. 1991) 9
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 2
Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) 13
Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986) 16
Brower v. County of Inyo, 489 U.S. 593 (1989) 4, 5, 6
Brower v. County of Inyo, 884 F.2d 1316 (9th Cir. 1989) 17
Brown v. Glossip, 878 F.2d 871 (5th Cir. 1989) 17
California v. Hodari D., 499 U.S. 621 (1991) 4, 5, 6, 7, 8, 9, 10
Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992).. 9, 10
Checki v. Webb, 785 F.2d 534 (5th Cir. 1986) 12
Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993) 10
Conner v. Sticher, 801 F.2d 1266 (11th Cir. 1986).. 12
Elliot v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992) 16, 17
Fagan v. City of Vineland, 22 F.3d 196 (3rd Cir. 1994) 13
Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986) 13, 14
Graham v. Connor, 490 U.S. 386 (1989) 5, 6, 7, 9, 10
Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) 14
Gutierrez-Rodriquez v. Cartagena, 882 F.2d 553 (1st Cir. 1989) 13
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 4, 17
Hunter v. District of Columbia, 943 F.2d 69 (D.C. Cir. 1991) 17
Jackson v. City of Beaumont Police Department, 958 F.2d 616 (5th Cir. 1992) 17
Jackson v. Culbertson, 984 F.2d 699 (5th Cir. 1993) 13

TABLE OF AUTHORITIES—Continued

	Page
Keller v. Frink, 745 F. Supp. 1428 (S.D. Ind. 1990)	8
Landol-Rivera v. Cruz Cosme, 906 F.2d 791 (1st Cir. 1990)	14
McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992)	9, 17
Medeiros v. Town of South Kingstown, 821 F. Supp. 823 (D.R.I. 1993)	14, 18
Medina v. City of County of Denver, 960 F.2d 1493 (10th Cir. 1992)	13
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2, 16, 17
Mouille v. City of Live Oak, Texas, 977 F.2d 924 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993)	11
Posr v. Doherty, et al., 944 F.2d 91 (2nd Cir. 1991)	10
Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991)	9, 17
Sawyer v. County of Creek, 908 F.2d 663 (10th Cir. 1990)	17
Scheuer v. Rhodes, 416 U.S. 232 (1974)	15
Siegert v. Gilley, 111 S. Ct. 1789 (1991)	16, 18
Stevens v. Corbell, 832 F.2d 884 (5th Cir. 1987)	17
Strachan v. City of Federal Heights, Colo., 837 F. Supp. 1086 (D. Colo. 1993)	11
Tennessee v. Garner, 471 U.S. 1 (1985)	10
Thompson v. Spikes, 663 F. Supp. 627 (S.D. Ga. 1987)	7, 18
Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988)	16
White v. Rochford, 592 F.2d 381 (7th Cir. 1979)	13
Yates v. City of Cleveland, 941 F.2d 444 (6th Cir. 1991)	11

Constitutional Provisions, Statutes and Court Rules:

U.S. Const., Amend. IV	2, *passim*
U.S. Const., Amend. V	2, *passim*
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1331	1
Fed. R. Civ. P. 12(b)(6)	5, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

CHARLES BELLA,

Petitioner,

v.

LEE CHAMBERLAIN and CURTIS MEYERS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Charles Bella, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceedings on May 20, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 24 F.3d 1251, and is reprinted in the appendix at 1a-16a, *infra*.

The memorandum opinion and order of the United States District Court for the District of New Mexico (Mechem, D.J.), has not been reported. It is reprinted in the appendix at 17a-24a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, the petitioner brought this suit in the United States District Court for the District of New Mexico, against two

officers of the United States Customs Service, seeking damages directly under the United States Constitution. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). On February 25, 1993, the district court denied the respondents' motion to dismiss, which claimed that the defendants had qualified immunity because the complaint failed to state a constitutional claim. *See* Appendix at 17a-24a, *infra*.

Respondents brought an immediate appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment"). On May 20, 1994, the Tenth Circuit entered a judgment and an opinion reversing the district court's order, and directing that petitioner's complaint be dismissed for failure to state a constitutional claim. *See* Appendix at 1a-16a, *infra*. No petition for rehearing was sought.

On August 8, 1994, Justice Ginsburg ordered that the time for filing this petition for writ of certiorari be extended to and including September 17, 1994.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. IV provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. Const., Amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On July 11, 1988, while piloting his Gazelle helicopter on a charter flight near Santa Fe, New Mexico, petitioner Charles Bella was hijacked. He was ordered at gunpoint to land in the New Mexico Penitentiary prison yard where the helicopter was boarded by three inmates. Mr. Bella was handcuffed to the controls of his helicopter and was ordered by his captors to fly south toward Albuquerque. Mr. Bella was ordered to land at an airport in Los Lunas, New Mexico, where the inmates disembarked, leaving Mr. Bella handcuffed to the helicopter. Respondent Chamberlain landed his United States Customs Service Blackhawk helicopter in front of the Gazelle. Another special agent, respondent Meyers, left the Blackhawk and approached the Gazelle. He saw one of the inmates return to the Gazelle, put a gun to Mr. Bella's head, and order him to take off again. Both Meyers and Chamberlain could see that Mr. Bella was being used as a shield, and they knew or should have known that Mr. Bella was an innocent hostage.

As Mr. Bella attempted to pilot the Gazelle away from Los Lunas while in handcuffs with a gun to his head, respondent Chamberlain hovered the Blackhawk within twenty to fifty feet of the Gazelle. Respondent Meyers, also aboard the Blackhawk, fired three rounds from a semi-automatic weapon at the Gazelle, one of which hit the Gazelle. Respondents then pursued the Gazelle during its brief flight to Albuquerque, as Mr. Bella, following the orders of his armed captor, landed first at Coronado Airport, and then flew to Albuquerque International Airport. A New Mexico State Police helicopter joined the chase at Coronado. While in flight, the respondents' helicopter and the state police helicopter boxed in the Gazelle, and again flew dangerously close to the Gazelle, forcing Mr. Bella to maneuver so as to avoid a deadly collision. These actions caused damage to the Gazelle helicopter and threatened Mr. Bella's life and safety. When the Gazelle

ultimately landed at Albuquerque International Airport, Mr. Bella and the remaining inmate captor were taken into police custody. Mr. Bella suffered no physical injury throughout the encounter, although he did suffer serious emotional trauma and substantial damage to his helicopter.

Mr. Bella's complaint, filed against the respondents on July 11, 1991, claims a violation of his Fourth Amendment right to be free from unreasonable searches and seizures, and his Fifth Amendment right to be free from the deprivations of liberty and property without due process of law. Respondents moved to dismiss the complaint, asserting that they were entitled to qualified immunity under the doctrine of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), because the complaint failed to state a constitutional claim.

On February 25, 1993, the district court issued its Memorandum Opinion and Order denying respondents' motion. With respect to the Fourth Amendment claim, the district court rejected respondents' attempt "to separate the officers' behavior during pursuit from the arrest which occurred at the end of the pursuit," and distinguished the case from *California v. Hodari D.*, 499 U.S. 621 (1991). *See* Appendix at 19a, *infra*. The district court applied the test of *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) ("it is enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result") to reach its conclusion that petitioner had stated a Fourth Amendment claim. According to the district court, it was sufficient to state a claim that the respondents' actions "were alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purpose of effecting the seizure of the Gazelle's occupants," thus contributing "to plaintiff's eventual seizure." Appendix at 20a, *infra*.

With respect to Mr. Bella's Fifth Amendment claim, the district court rejected respondents' contention that there can be no due process violation absent some physical injury, concluding that the use of deadly force against a hostage is sufficient to state a Fifth Amendment due process claim. Appendix at 21a, *infra.* Thus, the trial court denied respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss.[1]

The Tenth Circuit concluded that Mr. Bella had failed to state a constitutional claim under either the Fourth or Fifth Amendment. Appendix at 16a, *infra.* With respect to the Fourth Amendment claim, the Tenth Circuit refused to apply this Court's holdings in *Graham v. Connor,* 490 U.S. 386 (1989) and *Brower v. County of Inyo,* 489 U.S. 593 (1989). Instead, the Tenth Circuit applied the narrow definition of seizure contained in *California v. Hodari D.,* 499 U.S. 621 (1991), and concluded that since the conduct complained of preceded the effectuation of a "seizure" there could be no Fourth Amendment violation.

With respect to the Fifth Amendment claim, the Tenth Circuit rejected the trial court's conclusion that the use of potentially deadly force against an innocent hostage is sufficient to state a Fifth Amendment due process claim. Instead, the Tenth Circuit focused on the lack of physical injury, and went on to weigh the facts as alleged in the complaint to conclude that "the potentially deadly force" used in this case was not " 'grossly disproportionate' to the need presented," and therefore did not state a Fifth Amendment due process claim. Appendix at 14a, *infra.*

Based on the foregoing, the Tenth Circuit reversed the order of the district court, and remanded with instructions to dismiss the complaint. *Id.* at 16a.

---

[1] The trial court also rejected respondents' claim of qualified immunity, concluding that Mr. Bella's case involved constitutional rights which were clearly established at the time, and of which the respondents either knew or should have known. Appendix at 22a-24a, *infra.*

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Reliance on the Narrow "Seizure" Standard of *California v. Hodari D.*, 499 U.S. 621 (1991) to Deny Petitioner's Fourth Amendment Claim Conflicts With This Court's Opinion in *Graham v. Connor*, 490 U.S. 386 (1989) and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court Because It Is Confounding the Lower Courts and Has Led to Serious Conflicts Among the Circuits.

This case poses the fundamental question of whether all conduct in the course of a police encounter which culminates in a seizure is scrutinized under the Fourth Amendment in a civil action for damages. Restricting the Fourth Amendment inquiry to the precise moment of seizure, as the Tenth Circuit did, precludes from judicial redress under the Fourth Amendment wholly unreasonable police actions which ultimately, if not immediately, result in an injurious seizure of a free citizen. It precludes from Fourth Amendment review excessive force applied before seizure, after seizure, or in the course of a failed seizure, no matter how unreasonable or abusive the police conduct may be. This question therefore bears on the continuing vitality of the Fourth Amendment as a source of individual rights enforceable in a civil action for damages.

One might have thought that this question had been resolved several terms ago when this Court decided *Brower v. County of Inyo*, 489 U.S. 593 (1989) and *Graham v. Connor*, 490 U.S. 386 (1989). In *Brower*, this Court permitted Fourth Amendment scrutiny of police conduct in assembling a "deadman roadblock" to catch a fleeing suspect, even though the assembly of the roadblock preceded the eventual "moment of seizure" when the suspect actually ran into the roadblock. *See*, 489 U.S. at 597-99. *Brower* thus established that Fourth Amendment scrutiny encompasses police conduct intentionally applied to effect the seizure. *Id.* at 599.

Graham involved claims of excessive force against several police officers arising from an investigatory stop and detention during which Mr. Graham was held under varying degrees of police restraint. *See,* 490 U.S. at 389-91. This Court concluded that the Fourth Amendment provided "an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." *Id.* at 396. The Court held that *"all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard," *id.* at 395, n. 10, without reference to the specific moment in time when the seizure took place. If *Graham* and *Brower* control here, then the district court properly concluded that the actions here "alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purpose of effecting the seizure" were sufficient to state a Fourth Amendment claim for violation of petitioner's "right to be free from unreasonable seizure." Appendix at 20a, *infra.*

The difficulty arises, however, from this Court's later decision in *California v. Hodari D.,* 499 U.S. 621 (1991). *Hodari* involved a much different question concerning whether, in the context of a criminal prosecution, inculpatory evidence revealed after the pursuit of the subject had begun, but before he succumbed to a physical seizure, was lawfully gained evidence. The *Hodari* Court concluded that for suppression purposes under the exclusionary rule "[a] seizure is a single act, and not a continuous fact," *id.* at 625 (quoting *Thompson v. Whitman,* 18 Wall. 457, 471 (1874)), and that a seizure only occurs when a fleeing person is physically touched by police or submits to the officer's show of authority. *Id.* at 626.

The district court refused to apply *Hodari* to civil liability claims alleging that excessive force was used in the

process of effectuating an arrest, investigatory stop or other seizure. Appendix at 19a, *infra*. The Tenth Circuit, however, found that *Hodari* restricted the scope of Fourth Amendment inquiry in civil liability cases to force applied only at the moment of seizure. "[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." *Id.* at 10a, *infra*. Thus, the Tenth Circuit rejected Mr. Bella's contentions that the harm to his helicopter and the danger to his safety occurred in the course of his arrest. *Id.*[2] Thus, this case squarely presents the question whether *Graham* or *Hodari* should apply in determining whether a complaint states a Fourth Amendment excessive force claim. This important question cries out for final resolution by this Court, because it is confounding the lower courts, and has led to a serious conflict among the circuits.

Relying on *Hodari*, at least three circuit courts, including the Tenth Circuit in this case, have embarked upon the task of dissecting the chain of events leading up to a seizure to distinguish "pre-seizure" conduct precluded from Fourth Amendment scrutiny from seizure-related conduct which is actionable under the Fourth Amendment. In the process, the circuit courts have produced drastically

---

[2] The circuit court also decided that the shot which struck and damaged Mr. Bella's helicopter did not constitute physical force as applied to him. Appendix at 11a, n.8, *infra; but see Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (firing a weapon at an occupied vehicle constitutes deadly force toward its occupants).

Petitioner contends that while the moment in time standard in *Hodari* may be necessary in the exclusionary rule context, it makes no sense in the context of a civil claim for damages based on excessive force. The exclusionary rule determination focuses on a discrete moment in time and space, whereas the excessive force question focuses on the reasonableness of the entire police process which effectuates the seizure. In the latter instance it makes no sense, as the district court here recognized, "to separate the officers' behavior during pursuit from the arrest that occurred at the end of the pursuit." Appendix at 19a, *infra*.

conflicting interpretations on the scope of police conduct actionable under the Fourth Amendment.

The Tenth Circuit in this case indicates that only events "immediately connected with the actual seizure" will state a Fourth Amendment claim, but provides little guidance as to which events will be regarded as "immediately" effecting seizure and which will not. Appendix, at 10a, n.7.[3] The Seventh Circuit has rejected as "pre-seizure" conduct the actions of a group of police officers in surrounding the car of a suspect they had reason to believe was heavily armed. *See, Carter v. Buscher,* 973 F.2d 1328 (7th Cir. 1992). That court permitted Fourth Amendment scrutiny only of the officers' final acts in shooting the suspect in the shooting which ensued. *Id.* at 1333; *but see, McDonald v. Haskins,* 966 F.2d 292 (7th Cir. 1992) (Fourth Amendment cause of action stated where officer held a gun to a child's head and threatened to pull the trigger even though no physical contact or arrest ensued).

The Eighth Circuit has gone so far in applying *Hodari* in a civil context as to distinguish between shots fired at a fleeing truck in the last instants prior to seizure, finding

---

[3] Even within the Tenth Circuit, there are conflicting authorities on what police conduct is properly scrutinized under the Fourth Amendment standard of objective reasonableness. In the instant case, the Tenth Circuit found that Mr. Bella pled only "pre-seizure" conduct when he complained of force applied by federal officers to stop the helicopter in which he was being held hostage. Appendix at 9a-10a, *infra.* In *Quezada v. County of Bernalillo,* 944 F.2d 710 (10th Cir. 1991), however, the Tenth Circuit upheld a finding that a police officer violated the Fourth Amendment when his unreasonable tactics prior to the seizure ultimately necessitated the use of deadly force against the suspect. Moreover, in *Austin v. Hamilton,* 945 F.2d 1155, 1160 (10th Cir. 1991), the Tenth Circuit permitted Fourth Amendment scrutiny of force applied during a prolonged warrantless detention hours after the plaintiffs' arrests. Thus, even within the Tenth Circuit, there exists the fundamental conflict between *Hodari* and *Graham* which the petitioner asks this Court to address.

that only the officer whose bullet hit the suspect (and his supervisors) could be sued under the Fourth Amendment. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). That court concluded that plaintiffs had failed to state any constitutional claim against the officers whose shots failed to accomplish a *Hodari* seizure. *Id.* at 1333. The Eighth Circuit also restricted the "totality of the circumstances" test crafted in *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) and *Graham, supra*, at 396, to only those circumstances confronting the 'seizing' officer as he fired the 'seizing' shot. *See* 993 F.2d at 1333-34.[4]

Other circuit and district courts, like the district court in the instant case, have more faithfully followed *Graham*.

---

[4] Taken to its logical extreme, this kind of mechanistic view of the instrumentality effecting seizure would impose an absurd and unworkable standard. For example, where seizure is accomplished by a group of officers all landing blows upon the suspect, the jury would be obliged to apply a substantive due process standard to the "pre-seizure" blows, a Fourth Amendment standard to the singular blow found to be the "seizing blow" and, presumably, a pretrial detainee standard to any subsequent blows. *See e.g., Graham, supra* at 396, n.10 (declining to decide at what point in the custodial continuum arrest ends and pretrial detention begins). Such an approach would completely undermine the broad "totality of the circumstances" standard crafted in *Tennessee* and *Graham*.

Restricting Fourth Amendment scrutiny to the "moment of seizure" also forces the lower courts to make dispositive factual findings about when and how seizure occurred, often very early in litigation. *See* Appendix at 4a, *infra* (motion to dismiss); *Carter v. Buscher, supra* (motion for summary judgment); *Cole v. Bone, supra* (motion for summary judgment); *but see Posr v. Doherty, et al.*, 944 F.2d 91, 99 (2nd Cir. 1991) (issue of precisely when seizure occurred is a question of fact) (citing *Sibron v. New York*, 392 U.S. 40, 67 (1968)). Rather than applying a broad standard to test the sufficiency of plaintiff's complaint, the lower courts are increasingly obliged on pretrial or even pre-discovery qualified immunity motions to make exacting findings about the sequence of events in a seizure, about the timing of those events and about their causal relation to the seizure, deciding the quintessential jury questions of reasonableness and causation at a stage in the litigation when the facts themselves may be poorly understood and not of record. *See* Point III, *infra*.

These courts continue to permit a broad inquiry into the facts and circumstances surrounding a seizure. *See, e.g., Alexander v. City and County of San Francisco,* —— F.3d ——, 1994 WL 321757 n. 10 (9th Cir. 1994) (plaintiff stated a "classic" Fourth Amendment excessive force claim when she alleged that deadly force applied against an armed, mentally ill, elderly, half-blind recluse was prompted by the officers' objectively unreasonable conduct in storming the home when they knew the man had threatened to shoot anyone who entered); *Mouille v. City of Live Oak, Texas,* 977 F.2d 924 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 2443 (1993) (plaintiff who was injured in the course of the arrest of his business partner's son stated a Fourth Amendment claim); *Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir. 1991) (motion for qualified immunity denied where officer's "actions preceding the shooting were not those of an objectively reasonable police officer" and prompted the violent seizure); *Strachan v. City of Federal Heights, Colo.,* 837 F. Supp. 1086 (D. Colo. 1993) (summary judgment denied as to the non-shooting officers where there were genuine issues of material fact as to whether their participation in the operation was objectively unreasonable and proximately caused the deprivation of Mr. Strachan's constitutional rights).

Thus, conflicting decisions about the applicability of *Hodari* to civil liability cases and about the scope of Fourth Amendment claims in the excessive force context are proliferating, and the question poses a serious difficulty for the lower courts. The question is important and addresses the very vitality of the Fourth Amendment as a source of enforceable constitutional rights. There is little prospect for resolution of this far-reaching conflict without guidance from this Court. The need for guidance at this juncture is acute.

II. The Tenth Circuit's Failure to Acknowledge That the Intentional Use of Deadly Force Against an Innocent Hostage States a Claim Against Federal Police Officers Under the Fifth Amendment, Is In Conflict With the Decisions of Other Federal Courts of Appeals On the Same Matter, and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The district court in this case also rejected respondents' contention that there can be no due process violation absent some physical injury, and concluded that petitioner's allegations that the officers directed potentially deadly force against an alleged hostage, "was sufficient to state a substantive due process claim under the Fifth Amendment." Appendix at 22a, *infra*. The Tenth Circuit rejected the trial court's conclusion that the use of deadly force against a hostage is sufficient to state a Fifth Amendment due process claim. Appendix at 15a, *infra*. Instead, the Tenth Circuit concluded that this complaint failed to state a Fifth Amendment claim because it did not allege any physical injury to the plaintiff, *id.* at 12a-13a,[5] and also because, after weighing the facts as alleged in the complaint, it determined that "the potentially deadly force" used in this case was not "grossly disproportionate to the need presented." *Id.* at 14a. Both of these rulings by the Tenth Circuit are in conflict with the settled law in other circuits, and this court should accept certiorari to resolve the conflict.

First, as recognized by the Tenth Circuit, *see, id.* at 12a-13a, other circuits have held that the lack of physical injury does not defeat an otherwise valid due process claim of excessive force. *See, e.g., Conner v. Sticher*, 801 F.2d 1266 (11th Cir. 1986); *Checki v. Webb*, 785 F.2d

[5] Although the Tenth Circuit declared that it "need not decide" the propriety of allowing a due process claim to proceed in the absence of an allegation of physical injury, Appendix at 13a, *infra*, much of its rationale and its conclusion are based on the lack of physical injury in this case. *See id.* at 12a-15a.

534 (5th Cir. 1986); *Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) (upholding jury verdict based on police brandishing a weapon and threatening to shoot); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *but see, Jackson v. Culbertson*, 984 F.2d 699 (5th Cir. 1993) (some minimal physical injury required in prisoner Eighth and Fourteenth Amendment excessive force case).

Second, the Tenth Circuit's holding that the allegations setting forth the intentional use of deadly force against an innocent hostage failed to state a claim is in conflict with the clear law of other circuits.[6] Indeed, the cases cited by the Tenth Circuit establish that conflict. In *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986), the First Circuit reversed the grant of summary judgment on the issue of qualified immunity where police officers allegedly shot an innocent hostage. That court held that the intentional use of deadly force against an innocent hostage without reason or provocation was conduct that shocks the conscience and violated a clearly established right. *Id.* at 1216. *See also Gutierrez-Rodriguez v.*

---

[6] The legal standard which such claims must meet is currently an issue on which the courts are also sharply divided. This issue is discussed at length in the *en banc* Third Circuit opinion of *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994). There the majority held that the "shocks the conscience" standard is the appropriate standard in evaluating a police chase under the due process clause. However, the dissent catalogued the list of circuits which apply a recklessness standard and criticized the majority's analysis of the question.

The plaintiff argued here that he had met the "shocks the conscience" standard and the Tenth Circuit applied that standard here. Appendix at 12a, *infra*. However, in *Medina v. City of County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992), the Tenth Circuit appeared to adopt the recklessness standard, concluding that "[p]ractically every court that has considered the issue has concluded that reckless intent may violate section 1983." Thus, the confusion on this most basic question exists within the Tenth Circuit, as well as among the circuits and merits the consideration of this Court if the writ issues in this case.

Cartagena, 882 F.2d 553 (1st Cir. 1989) (use of deadly force against persons the police should have known might be innocent, was sufficient to find liability under the due process clause).[7]

Similarly, in *Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987), the Fifth Circuit upheld a jury verdict finding that the use of deadly force against an innocent person was a violation of the due process clause. There the court held that the defendants could have been found reckless where they should have known they could be endangering an innocent person by their actions. *Id.* at 167-68.

Each of the above cases was based upon a record amassed through trial or extensive discovery and the only case involving a pre-trial motion was a reversal of summary judgment. *See, Fernandez, supra.* Thus these cases stand for the proposition that police use of deadly force against an innocent hostage must at least state a claim under the due process clause. *See also Medeiros v. Town of South Kingstown*, 821 F. Supp. 823 (D.R.I. 1993) (innocent passenger of the car stated a claim under the due process clause where he alleged that a high speed chase endangered him). Indeed, petitioner can find no case other than the instant Tenth Circuit case where a

---

[7] Even the case of *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990), upon which the Tenth Circuit relies, conflicts with the Tenth Circuit approach. There the officers shot at a vehicle containing both the suspect and a hostage. The court found that the plaintiff was not entitled to affirmance of a jury verdict on due process grounds because it held that the officer who knew of the presence of the innocent hostage had only shot at the vehicle's tires. The officer who shot at the more deadly area of the door of the car believed both persons to be suspects. *Id.* at 797. The First Circuit's opinion is clearly based upon the facts developed at trial and notes that the lower court had earlier denied a defense motion for summary judgment. *Id.* at 794. Thus, *Landol-Rivera* properly allowed the plaintiff to proceed to trial on the allegations that the police shot at him as an innocent hostage in a car.

court has held that allegations stating that police officers used deadly force against an innocent hostage failed to state a claim under the due process clause.

III. The Tenth Circuit's Improper Weighing of the Evidence Alleged in the Complaint to Determine That "The Potentially Deadly Force" Used In This Case Was Not "Grossly Disproportionate to the Need Presented," Is in Conflict With Decisions of Other Federal Courts of Appeals on the Same Subject, and Demonstrates Why This Court's Qualified Immunity Jurisprudence Must Be Clarified to Require a Factual Record as a Predicate to the Determination of a Qualified Immunity Defense Against a Claim Under the Fourth or Fifth Amendment.

With respect to Mr. Bella's Fifth Amendment claim of excessive force, the Tenth Circuit, based solely on the facts asserted in the complaint, engaged in weighing of those factual assertions of abuse against its own constructed justifications for the use of that force, to conclude that "the potentially deadly force" used in this case was not "grossly disproportionate to the need presented." Appendix at 14a-15a, n.9, *infra*. The Tenth Circuit did so in the face of petitioner's contention that the egregiousness of respondents' actions could not be decided without further factual development and a more extensive record, because it felt precluded by this Court's qualified immunity jurisprudence from allowing any discovery on the matter. Appendix at 15a, n.10, *infra*.[8]

---

[8] Under settled Rule 12(b)(6) jurisprudence, to determine whether a plaintiff has stated a claim, the court is to consider not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to prove his claim. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The Tenth Circuit here did exactly what is prescribed in *Scheuer* and decided the case on the merits based solely upon the facts alleged in the pleadings. The court made its own factual findings and drew the ultimate factual conclusion that the governmental conduct was not egregious.

Indeed, the Tenth Circuit inferred that there was a risk of escape. In so doing, the court ignored the petitioner's allegations concern-

The problem began with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), holding that qualified immunity is an immunity from suit not a mere defense to liability. Recognizing the immense pre-trial task this would impose upon the courts if *Mitchell* required a resolution of factual issues on the merits, some courts refused to conduct a fact-based analysis on the merits. *See, Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986). When this Court then held in *Anderson v. Creighton*, 483 U.S. 635 (1987) that the trial court must conduct a fact-based inquiry, the First Circuit overruled *Bonitz* and held that a fact-based analysis was required by qualified immunity jurisprudence. *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988). However, this analysis generally continued to focus only upon whether the plaintiff was asserting a right which was clearly established of which the defendant knew or should have known, within the meaning of *Mitchell*. This Court then established, in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), that the first question to be resolved in a qualified immunity motion is whether the plaintiff had stated a claim at all.

The result of these rulings is that many lower courts, like the Tenth Circuit in the instant case, have been making ultimate factual determinations without the benefit of any evidentiary development of those facts.[9] *See,*

---

ing visual and radar contact throughout the chase and the size of the government helicopter giving chase, which supported petitioner's inference that escape was impossible. *See* Appendix at 14a, n.9, *infra*. Furthermore, the Tenth Circuit not only made its own factual findings unsupported by any record, but also refused to accept petitioner's allegations as true. *See id.* at 11a, n.8, *infra*.

[9] This has created an horrendous "Catch 22" for plaintiffs in that they are required to prove their case before discovery and based solely on the pleadings. In those instances where trial judges deny those motions, plaintiffs must then defend those denials on interlocutory appeals without the benefit of any factual development whatsoever. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The difficulty with this approach was aptly described by the Seventh Circuit in *Elliot v. Thomas*, 937 F.2d 338, 341 (7th Cir.

e.g., Jackson v. City of Beaumont Police Department, 958 F.2d 616 (5th Cir. 1992) (complaint must include facts sufficient to allow court to determine whether force used was reasonable); *Hunter v. District of Columbia,* 943 F.2d 69 (D.C.Cir. 1991) (complaint must contain facts sufficient to demonstrate that force used was "actually excessive"); *Sawyer v. County of Creek,* 908 F.2d 663 (10th Cir. 1990) (no deliberate indifference found where court required that complaint must include all factual allegations necessary to sustain conclusion that defendant violated clearly established law); *Brown v. Glossip,* 878 F.2d 871 (5th Cir. 1989) (complaint must allege facts sufficient for court to determine reasonableness).

A number of circuits, however, have held that whether or not the use of force was excessive in the circumstances is an issue for the factfinder and have refused to decide the issue on the pleadings or in some cases on summary judgment. *Alexander v. City and County of San Francisco,* —— F.3d ——, 1994 WL 321757 (9th Cir. 1994) (summary judgment inappropriate because reasonableness of force is a matter for the jury); *McDonald v. Haskins,* 966 F.2d 292 (7th Cir. 1992) (whether force used was excessive could not be decided without additional fact development of a summary judgment procedure); *Quezada v. County of Bernalillo,* 944 F.2d 710 (10th Cir. 1991) (factfinder decides if force used is objectively unreasonable; qualified immunity therefore of limited utility in excessive force case); *Brower v. County of Inyo,* 884 F.2d

---

1991), *cert. denied,* 112 S. Ct. 1242 (1992). *Elliot* recognized that by "sleight of hand you can turn any defense on the merits into a defense of qualified immunity." *Id.* Since the denial of the claim of immunity entitles the defendant to an immediate appeal, the process grants every public defendant a pretrial appellate decision on the merits. *See id.* at 341-42. The court noted that this is a far cry from the position of *Harlow, Mitchell,* and *Anderson* that describe qualified immunity as a defense contingent on the state of the law. *Id.* at 341; *see also, Stevens v. Corbell,* 832 F.2d 884 (5th Cir. 1987) (recognizing that qualified immunity is of limited utility in due process excessive force cases).

1316 (9th Cir. 1989) (whether force used was excessive could not be determined on the pleadings; whether non-deadly alternatives existed was a question of fact); *Medeiros v. Town of South Kingstown,* 821 F. Supp. 823 (D.R.I. 1993) (excessiveness of force could not be decided in context of motion to dismiss); *Thompson v. Spikes,* 663 F. Supp. 627 (S.D.Ga. 1987) (deciding reasonableness of force used would be more in nature of judgment on the merits than true determination of qualified immunity and was question for jury).

This conflict cries out for resolution. Clarification is necessary to eliminate the quality of unreality and gross unfairness which it brings to excessive force cases involving claims of qualified immunity. Qualified immunity as applied to excessive force cases where the legal standards turn on quintessential jury questions is unworkable without clarification. Petitioner, therefore, asks this Court to grant the writ and clarify its qualified immunity jurisprudence in excessive force cases to require a factual record as a predicate to the determination of a qualified immunity defense against a claim under the Fourth or Fifth Amendment.[10]

---

[10] Indeed, this Court has implicitly recognized the importance of the question presented here, when it granted the writ in *Siegert* on the related question of whether a complaint alleging malice as an essential element of a cause of action may be dismissed on the grounds of qualified immunity prior to limited discovery. 111 S. Ct. at 1796 (Marshall, J., dissenting). Although this Court's final resolution of *Siegert* did not require an answer to that question, the grant of the writ in that case at least recognized the importance of the question.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari and set this matter for plenary consideration.

Respectfully submitted,

ELIZABETH E. SIMPSON
(Counsel of Record)
TOMITA & SIMPSON, P.C.
4253 Montgomery Blvd., NE
Albuquerque, NM 87109
(505) 883-4993

BRAD D. HALL
KATHRYN HAMMEL
GADDY & HALL
2025 San Pedro Dr., NE
Albuquerque, NM 87110
(505) 254-9090

MICHAEL B. BROWDE
1117 Stanford, NE
Albuquerque, NM 87106
(505) 277-5326
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-2092

CHARLES BELLA,
Plaintiff-Appellee,
v.
LEE CHAMBERLAIN and CURTIS MEYERS,
Defendants-Appellants.

May 20, 1994

Before WHITE, Associate Justice (Ret.),* TACHA and BRORBY, Circuit Judges.

TACHA, Circuit Judge.

Plaintiff Charles Bella brought this action against defendants Lee Chamberlain and Curtis Meyers, two officers of the United States Customs Service, alleging that they used excessive force against him in violation of the Fourth and Fifth Amendments. Defendants both moved to dismiss Mr. Bella's complaint for failure to state a constitutional claim, also arguing that they were entitled to qualified immunity. The district court issued an order denying the motions. Defendants appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and reverse.

I. Background

A. Facts

The allegations in Mr. Bella's complaint, which we must accept as true, read like a Hollywood script. Mr.

---

* The Honorable Byron R. White, Associate Justice of the United States Supreme Court, (Ret.), sitting by designation, *pursuant* to 28 U.S.C. § 294(a).

Bella is the owner and chief pilot of Bear Helicopters. On July 11, 1988, Mr. Bella piloted his Aerospacial Gazelle helicopter ("Gazelle" or "helicopter") from El Paso to the Santa Fe Airport where he met Beverly Shoemaker to fly her over some real estate located near Santa Fe. Ms. Shoemaker had told Mr. Bella that she was the secretary to people who were interested in the real estate. After she and Mr. Bella boarded the helicopter and left the Santa Fe Airport, Ms. Shoemaker pulled a gun on Mr. Bella and ordered him to fly to the New Mexico State Penitentiary to assist in the escape of some inmates.

Following Ms. Shoemaker's orders, Mr. Bella landed the helicopter in the prison yard, where three inmates climbed on board. Mr. Bella then took off as ordered. Shortly after takeoff, one of the inmates handcuffed Mr. Bella to the helicopter. At the direction of the inmates, Mr. Bella piloted the helicopter to Los Lunas, New Mexico, and landed at the Mid-Valley Air Park. There, Ms. Shoemaker and the inmates disembarked, leaving Mr. Bella handcuffed to the helicopter.

Defendant Lee Chamberlain, an officer of the United States Customs Service, was piloting a Customs Service Blackhawk helicopter ("Blackhawk") when he observed the Gazelle helicopter on the ground at Mid-Valley Air Park. Officer Chamberlain landed the Blackhawk approximately seventy feet in front of the Gazelle. Defendant Curtis Meyers, a Customs Service officer, and Customs Service Agent Ken Hebert (who is not a defendant in this case) were passengers on the Blackhawk. Agent Hebert exited the Blackhawk and approached the Gazelle. At the same time, one of the inmates returned to the Gazelle, held a gun to Mr. Bella's head, and ordered him to take off. Agent Hebert was less than ten yards from the front of the Gazelle and was pointing an AR-15 semiautomatic rifle at the cockpit. Mr. Bella alleges that Officer Chamberlain saw that the inmate had a gun to Mr. Bella's head and was trying to hide behind Mr. Bella and to use

him as a shield. According to Mr. Bella, Officer Chamberlain knew at that point that Mr. Bella was an innocent hostage.

In an effort to prevent the Gazelle's takeoff, Officer Chamberlain hovered the Blackhawk within twenty to fifty feet directly in front of and above the Gazelle. Mr. Bella managed to get the Gazelle off the ground, narrowly avoiding a collision with the Blackhawk. As the Gazelle left Mid-Valley Air Park, Officer Meyers, still aboard the Blackhawk, fired three rounds from a semiautomatic weapon at the Gazelle, one of which struck the fleeing helicopter. Officer Chamberlain then landed the Blackhawk, picked up Agent Hebert, and began to pursue the Gazelle, which was flying north in the direction of Albuquerque with Mr. Bella and the inmate on board.

The Blackhawk chased the Gazelle for forty to fifty minutes. Following the inmate's orders, Mr. Bella landed the Gazelle briefly at Coronado Airport in northern Albuquerque and took off again heading south for Albuquerque International Airport. A New Mexico State Police helicopter joined the chase at this time, flying to the right of the Gazelle as the Blackhawk flew to the left. Mr. Bella alleges that the Blackhawk and the State Police helicopters "boxed in" the Gazelle, flying "dangerously close" to the Gazelle and forcing Mr. Bella to maneuver so as to avoid a collision. Mr. Bella finally landed the Gazelle at the Albuquerque International Airport where he and the inmate were taken into custody.

B. Procedural History

Mr. Bella brought this action in July 1991 in the United States District Court for the District of New Mexico alleging that Officers Chamberlain and Meyers used excessive force against him. In his complaint, Mr. Bella alleges that Officer Meyers violated his rights under both the Fourth and Fifth Amendments by firing at, and hitting, the Gazelle helicopter when Officer Meyers knew

or should have known that Mr. Bella was an innocent hostage. Mr. Bella alleges that Officer Chamberlain violated his Fifth Amendment rights by flying the Blackhawk helicopter dangerously close to the Gazelle, thus threatening Mr. Belle's life and safety, when Officer Chamberlain knew or should have known that Mr. Bella was an innocent hostage. Mr. Bella seeks damages [1] for injury to his Gazelle helicopter and for mental anguish and distress.

Officers Meyers and Chamberlain separately moved to dismiss Mr. Bella's complaint under Rule 12(b)(6).[2] Raising the defense of qualified immunity, the officers argued as a threshold matter that the complaint failed to state a constitutional claim. They also argued that, even if the complaint did state a constitutional claim, they were still entitled to qualified immunity because their actions were objectively reasonable. The district court held that the complaint stated a claim under the Fourth and Fifth Amendments and that the qualified immunity defense did not otherwise shield the defendants from liability. Making the same arguments they made below, Officers Meyers and Chamberlain now bring this appeal pursuant to *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985) (holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment").

---

[1] *See Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[2] The motions also sought to dismiss Mr. Bella's complaint pursuant to Rule 12(b)(2) on the ground that the district court lacked personal jurisdiction over the defendants because Mr. Bella failed to effect proper service. This issue is not before us.

II. Discussion

A. Qualified Immunity

We review de novo the denial of qualified immunity. *Powell v. Gallentine,* 992 F.2d 1088, 1090 (10th Cir. 1993). Qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 645 (10th Cir.1988). In *Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the Supreme Court made it clear that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of *whether the plaintiff has asserted a violation of a constitutional right at all.*" *Id.* at 231, 111 S.Ct. at 1793 (emphasis added); *see also Maldonado v. Josey,* 975 F.2d 727, 729 (10th Cir.1992) (citing *Siegert* and noting that the threshold inquiry in analyzing a qualified immunity claim is whether the complaint states a constitutional claim), *cert. denied,* —— U.S. ——, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *Losavio,* 847 F.2d at 646 (noting that once a defendant pleads qualified immunity, the burden shifts to the plaintiff "to show *both* that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred") (emphasis added). This threshold inquiry is purely a question of law, *Siegert,* 500 U.S. at 231, 111 S.Ct. at 1793, and though this inquiry takes place in the context of a qualified immunity defense, the same rules governing dismissal of complaints apply. We "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Williams v. Meese,*

926 F.2d 994, 997 (10th Cir.1991). A complaint may be dismissed for failure to state a claim "only when it appears that the plaintiff can prove no set of facts in support of the claim[] that would entitle the plaintiff to relief." *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas,* 927 F.2d 1111, 1115 (10th Cir.1991).

Officers Meyers and Chamberlain argue that the district court erred in denying their motions to dismiss primarily because Mr. Bella's complaint fails to meet the "necessary concomitant" requirement of stating a claim for a "violation of a constitutional right." *Siegert,* 500 U.S. at 231, 111 S.Ct. at 1793. Because we agree with defendants that plaintiff fails to state a valid constitutional claim, we do not address defendants' alternative argument that plaintiff failed to allege a violation of a "clearly established . . . right[] of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738.

B. Fourth Amendment

The Fourth Amendment protects individuals against "unreasonable searches and seizures." To state a claim of excessive force under the Fourth Amendment, a plaintiff must show both that a "seizure" occurred and that the seizure was "unreasonable." *Brower v. County of Inyo,* 489 U.S. 593, 599, 109 S.Ct. 1378, 1382-83, 103 L.Ed.2d 628 (1989). Mr. Bella's complaint alleges that Officer Meyers used excessive force in violation of the Fourth Amendment by discharging a firearm that struck Mr. Bella's Gazelle helicopter.[3] Officer Meyers, on the

---

nette v. Dresser Indus., Inc., 849 F.2d 1277, 1282 (10th Cir.1988). "Exceptions to this rule are rare and are generally limited to cases

[3] Mr. Bella admits that his complaint alleges a Fourth Amendment claim only against Officer Meyers, yet he attempts to assert on appeal a Fourth Amendment claim against Officer Chamberlain, pointing out that he has a request pending in the district court to so amend his complaint. We "generally will not address issues that were not considered and ruled upon by the district court." *Bur-*

other hand, contends that Mr. Bella has failed to state a Fourth Amendment claim because firing shots at and hitting the Gazelle helicopter did not result in a "seizure" since the shots were unsuccessful in stopping Mr. Bella. Officer Meyers asserts that no "seizure" occurred until Mr. Bella actually was taken into custody at the Albuquerque International Airport. In analyzing Mr. Bella's Fourth Amendment claim, we begin by identifying when the "seizure" occurred.

In *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the Supreme Court held that a "seizure" occurs only when a fleeing person is physically touched by police or when he or she submits to a show of authority by police.[4] *Id.* at 626-27, 111 S.Ct. at 1550-51. In adopting this position, the Court expressly stated that an assertion of authority by the police without submission by the fleeing person does not constitute a seizure. *Id.* at 626, 111 S.Ct. at 1550; *see also id.* 499 U.S. at 626 n. 2, 111 S.Ct. at 1551 n. 2 (noting that "neither usage nor common-law tradition

---

where . . . the appellate court feels it must resolve a question of law to prevent a miscarriage of justice." *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir.1991). Here, the district court did not rule on a Fourth Amendment claim against Officer Chamberlain. Mr. Bella offers no reason why we should grant an exception to the general rule, and after reviewing the record, we see no reason to grant such an exception in this case.

[4] Plaintiff makes the novel argument that *Hodari* is inapplicable in this case because *Hodari* dealt with an evidentiary issue whereas this case deals with an excessive force claim. This argument is entirely without merit. The discussion in *Hodari* focused specifically on what governmental action constitutes a "seizure," a question common to Fourth Amendment decisions involving suppression of evidence and those involving claims of excessive force. Lest any doubt remain regarding *Hodari*'s applicability to this case, we point out that other courts routinely have applied *Hodari* in the context of Fourth Amendment excessive force claims. *See Cole v. Bone*, 993 F.2d 1328, 1332-33 (33 Cir.1993); *Carter v. Buscher*, 973 F.2d 1328, 1332-33 (7th Cir.1992).

makes an *attempted* seizure a seizure"); *id.* at 628, 111 S.Ct. at 1552 (stating that a seizure does not occur during the course of a police pursuit of a fleeing vehicle if the pursuit, as a show of authority, does not produce a stop) (citing *Brower,* 489 U.S. at 597, 109 S.Ct. at 1381). This language in *Hodari* suggests that when law enforcement officers shoot at a fleeing suspect, a "seizure" occurs only if the shot strikes the fleeing person or if the shot causes the fleeing person to submit to this show of authority. A recent Eighth Circuit decision applying *Hodari* confirms this interpretation.

In *Cole v. Bone,* 993 F.2d 1328 (8th Cir.1993), the Eighth Circuit applied *Hodari* to determine when a "seizure" occurs for purposes of a Fourth Amendment excessive force claim. David Cole, driving an 18-wheel tractor-trailer truck eastbound on I-70, sped through a toll both in Bonner Springs, Kansas, without stopping to pay the toll. *Id.* at 1330. Kansas and Missouri police employed numerous tactics in an effort to stop the fleeing truck—they engaged in a high speed pursuit of the truck, they set up rolling and stationary roadblocks and they fired shots that struck the trucks' tires, radiator and window. *Id.* at 1330-31. All these efforts were unsuccessful. The truck finally came to a stop after a police officer, attempting to disable the trucks' engine, fired a shot that struck David Cole in the forehead. *Id.* at 1331. The court held that the driver was seized only when he was struck by the bullet, concluding that the officers' pursuit of the truck, the shots fired by the officers that struck the truck and the rolling and stationary roadblocks did not constitute a seizure because these assertions of authority failed to produce a stop. *Id.* at 1332-33; *see also Brower,* 489 U.S. at 597, 109 S.Ct. at 1381 (holding that a Fourth Amendment seizure of a fleeing suspect occurs "only when there is a governmental *termination* of freedom of movement *through means intentionally applied*") (first emphasis added); *United States v. Holloway,* 962 F.2d 451, 456-57 (5th Cir.1992) (fleeing sus-

pect not seized when police car blocked his car's path but only when he reversed gears and backed into another police car, thereby disabling his own car); *Clark v. Nassau County,* No. 89-1000-CIV-J-14, 1991 WL 350041 (M.D.Fla. Sept. 11, 1991) (holding that a fleeing suspect in a car was seized only when an officer actually shot him, not when several officers previously shot his vehicle's tires in an effort to stop him), *aff'd,* 968 F.2d 23 (11th Cir.1992).

Applying the rationale of *Hodari* and *Cole,* we conclude that the shots fired by Officer Meyers that struck Mr. Bella's helicopter did not result in a "seizure." The shots constituted an assertion of authority, but they did not cause Mr. Bella to submit[5] nor did they otherwise succeed in stopping him.[6] Indeed, Mr. Bella does not contend seriously that he was "seized" prior to the time he was actually arrested at the Albuquerque International Airport. He nevertheless asserts that we must examine Officer Meyers' alleged actions of excessive force leading up to the seizure at the Albuquerque International Airport (i.e., shooting at and hitting the Gazelle helicopter) in determining whether the seizure was reasonable. We disagree.

We do not look to events that occurred approximately one hour *prior to* Mr. Bella's actual seizure to determine if the seizure was reasonable. "A seizure is a single act, and not a continuous fact." *Hodari,* 499 U.S. at 625, 111 S.Ct. at 1550 (quoting *Thompson v. Whitman,* 18 Wall. 457, 471, 21 L.Ed. 897 (1874)). It must be re-

---

[5] We recognize that, because Mr. Bella was being held hostage at gunpoint, he was prevented from submitting to this show of authority. This fact, however, does not change our Fourth Amendment "seizure" analysis.

[6] We note, however, that it may not be a foregone conclusion that a Fourth Amendment "seizure" would have occurred even had the officer's shot accidentally hit Mr. Bella. *See Landol-Rivera v. Cruz Cosme,* 906 F.2d 791, 795-96 (1st Cir.1990).

membered that "[t]he Fourth Amendment prohibits unreasonable *seizures*, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." [7] *Cole*, 993 F.2d at 1333 (citation omitted); *see also Carter*, 973 F.2d at 1332 ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny."). Because Mr. Bella does not challenge his "actual" seizure at the Albuquerque International Airport, we conclude that his complaint fails to state a claim against Officer Meyers for a violation of the Fourth Amendment.

C. Fifth Amendment

In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 395, 109 S.Ct. at 1871. In the instant case, however, the alleged excessive force occurred prior to, not in the course of, the actual

[7] Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989) (stating that "*all* claims that law enforcement officers have used excessive force—deadly or not—*in the course of* an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard") (second emphasis added); *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (stating that "reasonableness depends on not only when a seizure is made, but also *how it is carried out*") (emphasis added). In this case, however, the shooting was not immediately connected with the actual seizure. Not only did the shooting occur one hour prior to the seizure, a lengthy helicopter chase intervened between the time of the shooting and the seizure.

"seizure" of Mr. Bella at the Albuquerque International Airport. Without deciding the issue, we assume that excessive force claims arising outside the context of a seizure still may be analyzed under substantive due process principles. *Accord Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir.1990); *Pleasant v. Zamieski*, 895 F.2d 272, 276 n. 2 (6th Cir.), *cert. denied*, 498 U.S. 851, 111 S.Ct. 144, 112 L.Ed.2d 110 (1990); *see also Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1408 n. 10 (9th Cir.1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990).

The Fifth Amendment Due Process Clause protects citizens from governmental deprivation of life, liberty and property without due process of law. Mr. Bella's complaint alleges a due process violation based on the fact that Officer Meyers "discharged a firearm at, and hit, [the Gazelle] helicopter" and that Officer Chamberlain threatened Mr. Bella's "life and safety" by flying the Blackhawk helicopter "dangerously close" to the Gazelle when both officers knew or should have known that Mr. Bella was an innocent hostage.[8] The district court, noting

---

[8] Somewhat disingenuously, Mr. Bella argues on appeal that his complaint alleges that Officer Meyers fired shots at him personally and not just at the Gazelle helicopter. Though we must accept the allegations of the complaint as true, construing them in the light most favorable to the plaintiff, this requirement applies only to those allegations that are "well-pleaded." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir.1991). Mr. Bella's allegation that Officer Meyers fired shots at him personally is not "well-pleaded." A single phrase in the complaint makes a passing reference to such an allegation, but no less than three paragraphs in the complaint specifically allege that Officer Meyers fired shots at, and hit, the Gazelle *helicopter*. It seems both ludicrous and inconsistent for Mr. Bella to now assert on appeal that Officer Meyers, who allegedly "knew or should have known" that Mr. Bella was an innocent hostage, intentionally shot at Mr. Bella personally. We assume that if Mr. Bella believed that he could show Officer Meyers fired directly at him, the complaint undoubtedly would have made more

that defendants employed "potentially deadly force," concluded that Mr. Bella's complaint stated a claim for excessive force under the Fifth Amendment. We disagree.

"Under the due process standard, the factors relevant to whether the use of force is excessive are: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the . . . officer." *Hannula v. City of Lakewood,* 907 F.2d 129, 131-32 (10th Cir.1990). Force inspired by malice or by "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience . . . may be redressed under [the Fifth Amendment]." *Hewitt v. City of Truth or Consequences,* 758 F.2d 1375, 1379 (10th Cir.), *cert. denied,* 474 U.S. 844, 106 S.Ct. 131, 88 L.Ed.2d 108 (1985). Here, the facts alleged in Mr. Bella's complaint fail to meet this high threshold.

First, the extent of Mr. Bella's injury is minimal. In fact, though he alleges "mental anguish and distress," he suffered no physical injuries, and we have never upheld an excessive force claim without some evidence of physical injury. *Compare Martin v. Board of County Comm'rs,* 909 F.2d 402, 407 (10th Cir.1990) (upholding excessive force claim where police officers' unreasonable conduct in transporting woman from hospital to prison aggravated an existing fracture in her neck) *with Hannula,* 907 F.2d at 132 (refusing to uphold excessive force claim where tight handcuffs caused plaintiff to experience pain, but produced no contusions, lacerations or damage to the bones or nerves of her wrists). Though some courts have suggested that an excessive force claim may be stated without proof of any physical injury in rare circumstances where one of the other due process factors involves particularly egregious governmental conduct, *see Gumz v. Morrissette,* 772 F.2d 1395, 1401-02 (7th Cir.1985)

---

than a passing reference to such an allegation and instead would have made the allegation in a specific and conspicuous manner.

("Circumstances involving actions of state officials maliciously designed to take advantage of a known mental weakness or instability and to evoke an extreme emotional response from an individual could violate Fourteenth Amendment due process guarantees (even if the emotional distress suffered by the individual did not result in any observable physical symptoms)."), *overruled on other grounds, Lester v. City of Chicago,* 830 F.2d 706 (7th Cir.1987); *Black v. Stephens,* 662 F.2d 181 (3d Cir. 1981) (upholding jury verdict against police officer who, without justification, brandished his revolver eighteen inches from a motorist's head, with the motorist's wife in the precise line of fire, and then threatened to shoot), *cert. denied,* 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982), we have never adopted this approach and we need not decide the propriety of such an approach in the instant case. The facts here simply do not demonstrate egregious governmental conduct.

Second, Mr. Bella's complaint makes no allegations of improper motives or malice. Nor can malice be inferred from the officers' actions of firing at and boxing in the Gazelle helicopter. *See Landol-Rivera,* 906 F.2d at 797 (holding that "where the fleeing suspect was armed, had threatened to kill his hostage, and had commandeered a car and abducted its driver, the decision to shoot toward the hijacked vehicle, by itself falls far short of demonstrating reckless or callous indifference toward the hostage's rights"). Indeed, Mr. Bella concedes that the officers were not inspired by malice, contending instead that the officers' actions constituted "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience." *Hewitt,* 758 F.2d at 1379. Thus, Mr. Bella essentially stakes his claim on the remaining due process factor, arguing that the officers' use of potentially deadly force was "grossly disproportionate to the need [presented]." *Wise v. Bravo,* 666 F.2d 1328, 1333 (10th Cir.1981). The facts as alleged in Mr. Bella's complaint, however, do not support this theory.

According to the complaint, an armed, escaped inmate was aboard the Gazelle helicopter and Officers Meyers and Chamberlain knew the inmate was holding Mr. Bella hostage. Officer Chamberlain first hovered the Blackhawk directly in front of and above the Gazelle to prevent its takeoff. When this failed, Officer Meyers fired three shots at the Gazelle as it left Mid-Valley Air Park. One shot struck the Gazelle. Officer Meyers refrained from firing upon the Gazelle once it left Mid-Valley Air Park. Officer Chamberlain, piloting the Blackhawk in pursuit of the Gazelle, "boxed in" and flew "dangerously close" to the Gazelle. The officers' actions, which were taken in an attempt to force Mr. Bella to land the Gazelle helicopter, undoubtedly constituted potentially deadly force, but not force "grossly disproportionate" to the need presented.[9]

The use of potentially deadly force in this case is a far cry from the facts of those cases in which courts have found that police officers violated an individual's substantive due process rights. *See, e.g., Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989) (upholding jury verdict against four plain clothes police officers who were conducting "preventive rounds" in search of drug traffickers and, with guns drawn, approached a young couple sitting in a car and began shooting without warning when the driver hastily started the engine and drove away, with one bullet striking the driver in the back, damaging his spinal cord and rendering him a paraple-

---

[9] Plaintiff alleges that a Customs Service radar aircraft had visual and radar contact with the Gazelle and that therefore the use of force was grossly disproportionate to the need presented. Plaintiff seems to suggest that the officers should have sat idly by until the entire episode came to a close, presumably when the Gazelle ran out of gas. Law enforcement is not so narrowly restricted during such tense hostage crises. Further, plaintiff's argument conveniently overlooks the fact that, had the officers entertained such idle thoughts, the inmate possibly would have escaped, or worse yet, maimed or killed Mr. Bella. In the latter scenario, we might very well be considering here whether the officers violated Mr. Bella's rights by their *failure* to employ more active tactics.

gic); *Fernandez v. Leonard*, 784 F.2d 1209, 1214-15 (1st Cir. 1986) (refusing to grant summary judgment on issue of qualified immunity for police officer where facts showed that officer deliberately shot an unarmed hostage three times at close range); *Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 167 (5th Cir.1985) (upholding jury verdict against police officers who intentionally shot and killed a man they mistook for a fleeing criminal suspect), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987). Further, we must exercise additional care in this case because "[t]o hold that [the use of potentially deadly force] in such circumstances violates the constitutional rights of a hostage whom the officers are trying to free would be to hamstring seriously law enforcement officers in their efforts to resolve explosive situations." *Landol-Rivera*, 906 F.2d at 797.

In sum, Mr. Bella's complaint does not demonstrate that the defendants used grossly disproportionate force. Moreover, Mr. Bella suffered no physical injuries and he concedes that the officers lacked any improper motives or malice. We therefore conclude that his complaint fails to state a claim for excessive force under the Fifth Amendment.[10]

---

[10] Plaintiff argues that he is entitled to engage in discovery prior to dismissal of his action. Plaintiff misunderstands the purpose of qualified immunity. Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985), the Supreme Court has determined that unless the plaintiff's allegations state a violation of clearly established constitutional right, a defendant pleading immunity is entitled to dismissal before the commencement of discovery. *Id.; Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738. The very purpose of qualified immunity is to "weed out" suits that fail to assert the violation of a clearly established constitutional right "without requiring a defendant . . . 'to engage in expensive and time consuming preparation to defend the suit on its merits.'" *Siegert*, 500 U.S. at 231, 111 S.Ct. at 1793.

III. Conclusion

Because Mr. Bella's complaint fails to state a constitutional claim under either the Fourth or Fifth Amendment, we REVERSE the order of the district court and REMAND with instructions to dismiss the complaint.

[Filed Feb. 5, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 91-693-M Civil

CHARLES BELLA,

Plaintiff,

v.

LEE CHAMBERLAIN and CURTIS MEYERS,

Defendants.

MEMORANDUM OPINION
AND ORDER

This matter comes on for consideration on defendants' motions to dismiss plaintiff's complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(2), filed December 23, 1991 and April 14, 1992. Having considered the motions, response, and replies, and being otherwise fully advised in the premises, I find that the motions are not well taken and will be denied.

In reviewing a motion to dismiss, a court must view facts in light most favorable to plaintiff. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). A motion to dismiss is properly granted where the plaintiff can establish no set of facts that entitle him to relief. *Id.*

BACKGROUND

Mr. Bella alleges the following facts. On July 11, 1988, while piloting his Gazelle helicopter on a charter flight, plaintiff was ordered at gunpoint to land in the New Mexico Penitentiary prison yard where the helicopter was boarded by three inmates. Plaintiff took off as ordered and flew south toward Albuquerque. Shortly after leaving the prison, the inmates hand-cuffed Mr. Bella to his helicopter. The Gazelle landed at the Los Lunas Mid-Valley Air Park where the inmates disembarked, leaving

Mr. Bella hand cuffffed to the helicopter. Defendant Chamberlain, piloting a United States Customs Service Blackhawk helicopter, landed approximately seventy feet in front of the Gazelle at Mid Valley. Special Agent Ken Hebert left the Blackhawk and approached the Gazelle at the same time one of the inmates returned to the craft, put a gun to Mr. Bella's head, and ordered him to take off again. Mr. Bella asserts that Agent Hebert was less than ten yards away from the Gazelle at that point and knew or should have known that plaintiff was an innocent hostage. Plaintiff also alleges defendant Chamberlain could see one escapee using the pilot as a shield, and defendant Chamberlain believed at the time that the pilot was an innocent hostage. As Bella tried to lift the Gazelle off the ground, defendant Chamberlain hovered the Blackhawk within twenty to fifty feet of the smaller craft. As the Gazelle left Mid-Valley Air Park, defendant Meyers, also on the Blackhawk, fired three rounds from a semi-automatic weapon at the Gazelle, one of which hit the fleeing helicopter. The Blackhawk pursued the Gazelle during the forty to fifty minute flight to Albuquerque. Mr. Bella's passenger ordered him to land at Coronado Airport; then, still obeying orders from his armed passenger, Mr. Bella took off again and flew toward the Albuquerque International Airport. A New Mexico State Police helicopter joined the chase at Coronado. Mr. Bella claims that the Blackhawk and the state helicopter boxed him in, each flying "dangerously close" to the Gazelle and forcing him to maneuver so as to avoid a collision. Plaintiff finally landed the Gazelle at the Albuquerque Airport where he and the inmate were seized.

CLAIM

Mr. Bella asserts claims against Customs officers Chamberlain and Meyers pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He pleads a fifth amendment claim against both defendants, alleging the use of excessive force in depriving him of liberty or property without due process

of law. He also asserts a claim against defendant Meyers under the fourth amendment for violation of his right to be free from unreasonable seizure.

Defendants reply that the complaint fails to state a violation of plaintiff's clearly established constitutional rights, and that even if plaintiff has stated a constitutional claim, defendants are government employees performing discretionary functions and are entitled to qualified immunity from suit. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

DISCUSSION

A. *Failure to State a Constitutional Claim*

Defendants argue that plaintiff has not adequately alleged a violation of his fourth amendment rights because defendants' allegedly excessive conduct did not result in a seizure. This argument is clearly without merit. The fourth amendment is implicated when law enforcement officers effect a search or seizure. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989). Defendants ask this court to separate the officers' behavior during pursuit from the arrest that occurred at the end of the pursuit. Defendants cite *California v. Hodari D.*, 111 S.Ct. 1547 (1991), for the proposition that a seizure does not occur until the one fleeing yields to authority.

The *Hodari* court found no seizure until the subject yielded to a show of force, and therefore ruled that evidence thrown away by the fleeing suspect was not the fruit of an illegal seizure. *Id.* at 1552. The facts in the present case are quite different. Here, the fleeing individual is alleged to have been a hostage held at gunpoint and subjected to pursuit by federal officers which finally ended in plaintiff's arrest.

Courts have found excessive force without physical contact. *Martin v. Board of County Commissioners of Pueblo County*, 909 F.2d 402 (10th Cir. 1990). The *Hodari* court refers back to its opinion in *Brower v. Inyo*

County, 489 U.S. 593 (1989). Brower evaded police in a stolen car and was finally killed when he drove into a police roadblock. The court concluded that the fleeing suspect was not "seized" during the 20 mile chase that preceded his death, but was seized when he drove into the roadblock placed by officers. The case was remanded for a determination of whether the roadblock as constructed was reasonable force. In defining at what point the plaintiff had been seized, the court looked to deliberate actions taken by the officers. The court stated that a fourth amendment seizure occurs "only when there is a government termination of freedom of movement *through means internally applied*." *Brower* at 597. "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599.

The court distinguished the circumstances of *Brower* with that of a fleeing suspect who loses control of a vehicle and slams into a wall. There is no direct police action in the second case, and it cannot, therefore, raise a claim of excessive force in violation of the constitution. However, the actions which are the basis of Mr. Bella's claim were alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purposes of effecting the seizure of the Gazelle's occupants. Defendants' alleged deliberate actions contributed to plaintiff's eventual seizure. Plaintiff's complaint raises a claim for violation of his fourth amendment right to be free from unreasonable seizure.

To state a claim for use of excessive force which violates the fifth amendment, plaintiff must show defendants' actions constituted an excessive use of force under the substantive due process standard. *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990). Under due process, the court looks first at the relationship between the amount of force necessary under the circumstances and the amount applied; then to the injuries plaintiff re-

ceived; and finally at the defendants' motives. Use of force amounting to an abuse of power that "shocks the conscience" or is motivated by malice violates substantive due process rights. *Hannula* at 131-32.

Defendants first aver that the use of deadly force was appropriate against the fleeing inmates and within the scope of the officers' duty. Defendants also point out that Mr. Bella alleges no physical injuries as a result of their actions. Finally, defendants assert that they acted without malice and caused no injury, so their behavior could not "shock the conscience."

The use of deadly force against a hostage has been found to violate constitutionally protected rights. *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986). The *Fernandez* court found that qualified immunity was not available to a federal law enforcement officer who, acting deliberately, shot and killed a hostage held at gunpoint. Although the court found no indication of malice on the part of the F.B.I. agent, "[g]unning down an innocent hostage without reason or provocation is 'conduct that shocks the conscience.'" *Id.* at 1216. The court cited a clear line of cases "finding a due process violation in situations where the police had intentionally shot someone without justification." *Id.*

Defendants cite *Hannula* for the proposition that there cannot be a due process violation absent some physical injury. Plaintiff in that action accused a police officer of using excessive force when he failed to loosen handcuffs that had been applied too tightly. *Hannula* at 130. The plaintiff, although complaining of some physical impairments as a result of the officer's actions, presented no evidence of injury to the court. The court inferred from the absence of physical injury that the force applied by the officer was insubstantial. *Id.* at 132. In addition, the court cited a line of cases holding that the specific behavior complained of in the case, applying handcuffs that were too tight and leaving them in place, did not violate

constitutional rights. *Id.* Finally, the court contrasted plaintiff's claim over the use of handcuffs with successful claims of excessive force where injuries were substantial and where the potential for injury was significantly greater than the potential posed by handcuffs. *Id.* This case is distinguished from *Hannula* by the fact that officers directed potentially deadly force against an alleged hostage.

To address the subjective third prong of the substantive due process standard. I refer again to the holding in *Leonard* that deliberately shooting a hostage is behavior that "shocks the conscience." *Leonard* at 1216. Considering the three factors together, plaintiff has alleged sufficient evidence to establish that the defendants' actions violated a clearly established constitutional right.

B. *Qualified immunity*

The defense of qualified immunity is available to government officials performing discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Immunity shields officials from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* When qualified immunity is asserted as a defense, plaintiff bears the burden to show that the defendant violated the law, and that the law was clearly established at the time defendant acted. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). The plaintiff need not establish that defendant's specific act had previously been found to violate the law, but must establish a "substantial correspondence" between defendant's conduct and conduct previously found unconstitutional. *Hannula* at 131. Qualified immunity is a legal question to be determined by the court. *Pueblo* at 646.

The Tenth Circuit's treatment of the qualified immunity issue raised in response to excessive force claims has

changed over time. Under the current rule, the court evaluates the defense by examining the objective reasonableness of defendants' actions in light of the law clearly established at the time defendants acted. *Austin v. Hamilton*, 945 F.2d 1155, 1160-61 (10th Cir. 1991). This rule was adopted after the Supreme Court ruled in *Graham v. Connor*, 490 U.S. 386 (1989), that the constitutional prohibition against "unreasonable search and seizure" required the court to impose an objective test when assessing whether officers used excessive force in effecting an arrest. *Id.* at 395. Before the *Graham* ruling the Tenth Circuit evaluated a qualified immunity defense to excessive force claims under the substantive due process standard. *Hannula* at 131. Therefore, qualified immunity was available to an official performing a discretionary function unless plaintiff established that the official used greater force than necessary under the circumstances, the force injured the plaintiff, and the officer acted maliciously or in such a way as to shock the conscience. Since *Graham*, this circuit applies the "objectively reasonable" standard to all claims of excessive force arising under the 4th amendment, even to those arising before *Graham* if they are specifically pled under the 4th amendment. *Austin* at 1161.

Currently in the Tenth Circuit, a plaintiff alleging the use of excessive force in the course of an arrest or investigative stop must show that the officer's behavior violated clearly established law the officer knew or should have known. *Id.* at 1158. The test is the same if qualified immunity is advanced as a defense. *Id.* at 1161. A claim of excessive force arising out of actions taken before *Graham v. Connor* (May 1989) and specifically pled under the fourth amendment must pass the same test to overcome the qualified immunity defense. *Austin* at 1161. However, *Austin* provides that claims of excessive force arising before Graham, as this case does, and not specifically pled under the fourth amendment, must overcome an immunity claim under the substantive due process

standard. *Id.* Mr. Bella specifically pled a fourth amendment claim only against defendant Meyers. However, I am satisfied that, under facts pled by the plaintiff, qualified immunity is not available to the defendants under either the objective reasonableness or the substantive due process standards.

IT IS SO ORDERED.

/s/ E. L. Mechem
Senior United States District Judge

(2)

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-527

In the Supreme Court of the United States

OCTOBER TERM, 1994

CHARLES BELLA, PETITIONER

v.

LEE CHAMBERLAIN AND CURTIS MEYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

1994

QUESTION PRESENTED

1. Whether the complaint failed to allege violation of a clearly established Fourth Amendment right against unreasonable seizure where the challenged force was used almost one hour before the seizure.

2. Whether the complaint failed to allege violation of a clearly established Fifth Amendment substantive due process right where the challenged force caused no physical injury, was concededly used without malice, and was not so disproportionate to the need as to shock the conscience.

3. Whether a complaint that fails to state a claim is properly dismissed prior to discovery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alexandria v. *City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), petition for cert. pending, No. 94-876	11-12
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	2
Black v. *Stephens*, 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1088 (1982)	13
Butz v. *Economou*, 438 U.S. 478 (1978)	15
Brower v. *County of Inyo*, 489 U.S. 593 (1989)	6, 11
California v. *Hodari D.*, 499 U.S. 621 (1991)	5, 6, 7, 9, 11
Checki v. *Webb*, 785 F.2d 534 (5th Cir. 1986)	13
Cole v. *Bone*, 993 F.2d 1328 (8th Cir. 1993)	6
Conner v. *Sticher*, 801 F.2d 1266 (11th Cir. 1986)	12
Elder v. *Holloway*, 114 S. Ct. 1019 (1994)	15
Fagan v. *City of Vineland*, 22 F.3d 1296 (3d Cir. 1994)	14
Fernandez v. *Leonard*, 784 F.2d 1209 (1st Cir. 1986)	5, 13, 14
Graham v. *Connor*, 490 U.S. 386 (1989)	7, 10
Grandstaff v. *City of Borger*, 767 F.2d 161 (5th Cir. 1985), cert. denied, 480 U.S. 916 (1987)	14
Gutierrez-Rodriguez v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989)	14
Hannula v. *City of Lakewood*, 907 F.2d 129 (10th Cir. 1990)	5
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	6, 10

Cases—Continued: Page

Hewitt v. *City of Truth or Consequences*, 758 F.2d 1375 (10th Cir.), cert. denied, 474 U.S. 844 (1985) 7, 8
Landol-Rivera v. *Cruz Cosme*, 906 F.2d 791 (1st Cir. (1990) 8
McDonald v. *Haskins*, 966 F.2d 292 (7th Cir. 1992) 12
Medina v. *City & County of Denver*, 960 F.2d 1493 (10th Cir. 1992) 14
Miree v. *DeKalb County*, 433 U.S. 25 (1977) 14
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 6
Mouille v. *City of Live Oak*, 977 F.2d 924 (5th Cir. 1992), cert. denied, 113 S. Ct. 2443 (1993) 12
Siegert v. *Gilley*, 500 U.S. 226 (1991) 15
Tennessee v. *Garner*, 471 U.S. 1 (1985) 7, 11
Yates v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) ... 12
White v. *Rochford*, 592 F.2d 381 (7th Cir. 1979) 13

Constitution and rule:

U.S. Const.:
Amend. IV 2, 4, 5, 6, 7, 9, 10, 11
Amend. V 2, 4, 5, 6, 7, 12, 13
Fed. R. Civ. P. 12(b)(6) 14

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-527

CHARLES BELLA, PETITIONER

v.

LEE CHAMBERLAIN AND CURTIS MEYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 24 F.3d 1251. The opinion of the district court (Pet. App. 17a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1994. On August 8, 1994, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including September 17, 1994. The petition for a writ of certiorari was filed on September 19, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner brought this damage action pursuant to *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against respondents Lee Chamberlain and Curtis Meyers, two officers of the United States Customs Service. Petitioner alleged that respondents used excessive force in violation of his Fourth and Fifth Amendment rights in attempting to stop a helicopter piloted by petitioner while he was being held hostage at gunpoint by escaped convicts from a state penitentiary.

According to the complaint, the allegations of which the court of appeals assumed to be true, Pet. App. 1a, petitioner owned and acted as chief pilot for Bear Helicopters. On July 11, 1988, petitioner took off in his Aerospacial Gazelle helicopter from the Santa Fe, New Mexico, airport with a passenger, Beverly Shoemaker. Shoemaker had told petitioner she worked as a secretary to people interested in a parcel of real estate near Santa Fe, and she had arranged a flight over the real estate purportedly to look at it on their behalf. After Shoemaker and petitioner boarded the Gazelle, however, Shoemaker pulled out a gun and ordered petitioner to fly to the New Mexico State Penitentiary to assist in the escape of some inmates. Petitioner landed the helicopter in the prison yard, and three inmates boarded. Petitioner then took off, as ordered, and one of the inmates handcuffed him to the helicopter. *Id.* at 2a.

Petitioner flew to Los Lunas, New Mexico, and landed at the Mid-Valley Air Park. There, the inmates and Shoemaker got out, leaving petitioner handcuffed to the helicopter. A Customs Service Blackhawk helicopter, piloted by Chamberlain and carrying Meyers and another Customs Service agent, also landed at Mid-Valley. The

third agent, Ken Hebert, who is not a respondent, got out of the Blackhawk and approached the Gazelle.[1] One of the inmates then returned to the Gazelle, held a gun to petitioner's head, and ordered petitioner to take off. Hebert was less than ten yards from the Gazelle and was pointing an AR-15 semi-automatic rifle at the cockpit when petitioner took off. Chamberlain, who was in the Blackhawk, noticed that an escaped prisoner was trying to hide behind petitioner and use him as a shield; according to the complaint, Chamberlain then realized that petitioner was an innocent hostage. Pet. App. 2a-3a.

As petitioner attempted to take off, Chamberlain, with Meyers on board, hovered the Blackhawk directly in front of and above the Gazelle in an effort to keep it on the ground. Petitioner nevertheless managed to get the Gazelle in the air. As the Gazelle was leaving the Air Park, respondent Meyers fired three rounds from a semi-automatic weapon, one of which struck the Gazelle.[2] Chamberlain and Meyers then returned to the Air Park in the Blackhawk, picked up Hebert, and headed off after the Gazelle. The Gazelle was flying north in the direction of Albuquerque with petitioner and the armed inmate on board. Pet. App. 3a.

---

[1] The petition incorrectly asserts that it was Meyers who left the Blackhawk and approached the Gazelle, Pet. 3; the complaint alleged that Hebert did so. See Pet. App. 2a.

[2] In his brief in the court of appeals, petitioner stated that the shot hit the skid of the helicopter as it was taking off. Pet. C.A. Br. 21 ("Agent Meyers fired three shots from a hovering helicopter at another that was taking off. Of the three shots fired, one hit the skids of [petitioner's] helicopter and the other two went wide."). The court of appeals held that the complaint could not reasonably be construed to have alleged that the shots were fired at petitioner personally. Pet. App. 11a n.8.

The Customs Service Blackhawk chased petitioner's Gazelle for forty to fifty minutes. Petitioner, following the armed inmate's orders, landed briefly at Coronado Airport in northern Albuquerque and took off again for Albuquerque International Airport. A New Mexico State Police helicopter then joined the chase, flying to the right of the Gazelle as the Blackhawk flew to the left, "box[ing] in" the Gazelle. The complaint alleges that the Blackhawk and the State Police helicopter flew "dangerously close" to the Gazelle, forcing petitioner to maneuver to avoid colliding with the pursuing helicopters. Petitioner finally landed the Gazelle at Albuquerque International Airport where he and the inmate were taken into custody. Pet. App. 3a.

2. Petitioner filed suit in July, 1991, alleging that respondent Meyers violated petitioner's Fourth Amendment rights by firing at and hitting the Gazelle helicopter when Meyers knew or should have known that petitioner was an innocent hostage. Petitioner also alleged that both respondents violated petitioner's Fifth Amendment rights when Meyers fired at, and hit, the Gazelle helicopter, and when Chamberlain flew the Blackhawk dangerously close to the Gazelle, endangering petitioner's life and safety, when they knew or should have known that petitioner was an innocent hostage. Pet. App. 3a-4a. Petitioner acknowledges that he "suffered no physical injury throughout the encounter." Pet. 4. The complaint alleged that petitioner suffered "mental anguish and distress" and incurred damage to his helicopter. Compl. 7.

Respondents each moved to dismiss, contending that the complaint failed to state constitutional claims, and that respondents were, in any event, entitled to qualified immunity. The district court denied respondents'

motions. The court held that the complaint stated a claim against respondent Meyers, who fired the shots, of violation of petitioner's Fourth Amendment right to be free from unreasonable seizure. The challenged actions, the court stated, "were alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purposes of effecting the seizure of the Gazelle's occupants," and those actions "contributed to [petitioner's] eventual seizure." Pet. App. 20a. The district court rejected respondent's reliance on the holding of *California* v. *Hodari D.*, 499 U.S. 621 (1991), that no seizure occurs until a fleeing person yields to authority, by concluding that "the facts in the present case are quite different." Pet. App. 19a.

The district court also held that the complaint stated a claim of use of excessive force by both respondents in violation of the Fifth Amendment. The court recited the three relevant factors as (1) the relationship between the amount of force used and that which is necessary under the circumstances; (2) the injuries received; and (3) the officials' motives. Pet. App. 20a-21a (citing *Hannula* v. *City of Lakewood*, 907 F.2d 129 (10th Cir. 1990)). The court analogized the case to one in which a Federal Bureau of Investigation agent was held to have used excessive force when he "gunn[ed] down an innocent hostage without reason or provocation." Pet. App. 21a (citing *Fernandez* v. *Leonard*, 784 F.2d 1209 (1st Cir. 1986)). The court held that the absence of allegations of malice was no more fatal to petitioner's claim than it was to the claim in *Leonard*, Pet. App. 21a, and that allegations of physical injury are likewise not required, *id.* at 21a-22a.

The court denied respondents qualified immunity on both claims. Reviewing "the objective reasonableness of

defendants' actions in light of the law clearly established at the time defendants acted," Pet. App. 23a, the court was "satisfied that, under facts pled by the plaintiff, qualified immunity is not available to the defendants under either the objective reasonableness [Fourth Amendment] or the substantive due process [Fifth Amendment] standards." Pet. App. 24a.

3. The respondents took an immediate appeal from the denial of qualified immunity, see *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and the court of appeals reversed. Pet. App. 1a-16a.[3]

The court of appeals held that "plaintiff fails to state a valid constitutional claim," Pet. App. 6a, and that it therefore did not need to reach the question whether petitioner had alleged "a violation of a 'clearly established . . . right[] of which a reasonable person would have known,'" *ibid.* (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The court of appeals explained that, to state a claim under the Fourth Amendment, petitioner would have to allege "both that a 'seizure' occurred and that the seizure was 'unreasonable.'" Pet. App. 6a (citing *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989)). Relying on *Hodari D.*, 499 U.S. at 625, the court held that the shots respondent Meyers fired at the helicopter did not result in a seizure because, although they constituted a show of authority, they did not cause petitioner to submit. Pet. App. 9a. The Fourth Amendment "prohibits unreasonable *seizures*, not unreasonable or ill-advised conduct in general," Pet. App. 10a (quoting *Cole* v. *Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993)). The court held that the alleged seizure occurred only when

---

[3] The case was heard by a panel of the Tenth Circuit that included Associate Justice Byron R. White (Ret.), sitting by designation. Pet. App. 1a.

petitioner was finally taken into custody at Albuquerque International Airport. Pet. App. 10a. Petitioner did not challenge the constitutionality of that "actual" seizure. *Ibid.* The court noted that "[a] seizure is a single act, and not a continuous fact," *id.* at 9a (quoting *Hodari D.*, 499 U.S. at 625), and declined to find a separate Fourth Amendment violation based on events preceding the seizure by approximately an hour. Pet. App. 9a.[4]

Assuming without deciding that excessive force arising outside of the context of a seizure may give rise to a Fifth Amendment substantive due process claim, the court of appeals held that petitioner failed to state such a claim. Pet. App. 10a-15a. Respondents' alleged conduct of shooting at the Gazelle, and flying the Blackhawk "dangerously close" to petitioner's helicopter, did not amount to use of excessive force. That conduct was neither "inspired by malice" nor by "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience." Pet. App. 12a (quoting *Hewitt* v. *City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.), cert. denied, 474 U.S. 844 (1985)).

The court of appeals, like the district court, applied the three-factor test for excessive force claims set forth in the Tenth Circuit's opinion in *Hannula*. The court first concluded that petitioner's injury was minimal. He alleged neither physical injury, as required under Tenth

---

[4] The court of appeals noted that "[o]bviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable," Pet. App. 10a n.7 (citing *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985)), but held that the shooting challenged in this case "was not immediately connected with the actual seizure. Not only did the shooting occur one hour prior to the seizure, a lengthy helicopter chase intervened between the time of the shooting and the seizure." Pet. App. 10a n.7.

Circuit cases, nor the kind of "particularly egregious governmental conduct" that might have supported a due process claim in the absence of physical injury. Pet. App. 12a-13a.

Second, the complaint did not allege improper motive or malice, nor could malice be inferred from the alleged actions. Instead, petitioner "concede[d] that the officers were not inspired by malice," arguing instead that their actions "constituted 'unwise, excessive zeal amounting to an abuse of official power that shocks the conscience.'" Pet. App. 13a (quoting *Hewitt*, 758 F.2d at 1379).[5]

Third, the force petitioner alleged was not grossly disproportionate to the need. The court of appeals held that "[t]he officers' actions, which were taken in an attempt to force [petitioner] to land the Gazelle helicopter, undoubtedly constituted potentially deadly force, but not force 'grossly disproportionate' to the need presented." Pet. App. 14a. The court emphasized that "[t]o hold that [the use of potentially deadly force] in such circumstances violates the constitutional rights of a hostage whom the officers are trying to free would be to hamstring seriously law enforcement officers in their efforts to resolve explosive situations.'" *Id.* at 15a (quoting *Landol-Rivera* v. *Cruz Cosme*, 906 F.2d 791, 797 (1st Cir. 1990)).[6]

---

[5] See Pet. C.A. Br. 19 ("though there are no allegations of malice, Defendants['] actions were, at least, inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience").

[6] The court rejected petitioner's contention that a Customs Service radar aircraft's visual and radar contact with the Gazelle rendered the use of force grossly disproportionate to the need presented. The officers need not have "sat idly by until the entire

The court of appeals rejected petitioner's contention that he was entitled to discovery before the complaint was dismissed. Pet. App. 15a n.10. The court reversed and remanded the case to the district court with instructions to dismiss the complaint. *Id.* at 16a.

ARGUMENT

1. Petitioner was taken into custody at the Albuquerque International Airport, and petitioner does not challenge the constitutionality of respondents' actions there. Pet. App. 10a. Petitioner argues instead that the federal officers' use of force in their initial, unsuccessful effort to stop petitioner's helicopter at Mid-Valley Air Park violated the Fourth Amendment. The actions petitioner challenges, however, amounted neither to a use of force against his person, nor a show of authority to which he submitted, and thus did not amount to a seizure. See *Hodari D.*, 500 U.S. at 626 (no arrest occurs unless there is either physical contact with the individual, or "*submission* to the assertion of authority"). Petitioner asserts that respondents used unreasonable force in hovering the Blackhawk helicopter close to petitioner's Gazelle, and firing at petitioner's helicopter in a failed effort to stop it from fleeing. Because those actions did not effect a seizure, the court

---

episode came to a close, presumably when the Gazelle ran out of gas." Pet. App. 14a n.9. In the court's view, "[l]aw enforcement is not so narrowly restricted during such tense hostage crises." *Ibid.* Indeed, the court viewed it as arguable that the officers had an *obligation* to act as they did: Had the officers refrained from trying to stop the Gazelle, "the inmate possibly would have escaped, or worse yet, maimed or killed [petitioner]. In the latter scenario, we might very well be considering here whether the officers violated [petitioner's] rights by their *failure* to employ more active tactics." *Ibid.*

of appeals held that, under established law, they cannot support a Fourth Amendment claim.[7]

Petitioner contends that the decision below improperly "[r]estrict[s] the Fourth Amendment inquiry to the precise moment of seizure." Pet. 6. Contrary to petitioner's contention, however, the court of appeals expressly did not hold that assessment of the reasonableness of force used in effecting a seizure is limited to "the precise moment of seizure." Rather, the court stated that "[o]bviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable." Pet. App. 10a n.7. The court commented that the shooting did not bear on the reasonableness of the seizure here, however, because "[n]ot only did the shooting occur one hour prior to the seizure, a lengthy helicopter chase intervened between the time of the shooting and the seizure." *Ibid.*

Nor does the court of appeals' interpretation of *Hodari D.* conflict with this Court's decision in *Graham* v. *Connor*, 490 U.S. 386 (1989), as petitioner contends (Pet. 6-11). In *Graham*, police officers exerted force when they arrested, handcuffed, shoved and threw the arrestee with such force that he sustained a broken foot, cuts, bruised forehead and an injured shoulder. 490 U.S. at 389-390. *Graham* thus did not address the question petitioner seeks to present here regarding whether

---

[7] Nor did petitioner even attempt to meet his burden to show that his rights were clearly established. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). His failure to do so once respondents asserted their qualified immunity is an additional reason review is unwarranted.

events that were both causally and temporally remote from the seizure bear on the seizure's reasonableness.[8]

Petitioner similarly errs in contending (Pet. 6) that the decision below conflicts with *Brower* v. *County of Inyo*, 489 U.S. 593 (1989). *Brower*, like *Graham*, did not address whether a use of force remote from the seizure rendered an otherwise peaceful arrest unconstitutional under the Fourth Amendment. In *Brower*, fatal force was exerted at the precise moment of the seizure. The police erected a roadblock by placing an 18-wheel tractor-trailer across a two-lane highway, behind a blind curve, in order to stop Brower by physical impact, and succeeded in doing so when he crashed into the roadblock and died. 489 U.S. at 594. Both the court of appeals here (Pet. App. 6a, 8a) and this Court in *Hodari D.*, 499 U.S. at 628, expressly took *Brower* into account, and found no conflict. As the *Hodari D.* Court explained, the Court in *Brower* "did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, that 'show of authority' did not produce his stop." 499 U.S. at 628.[9]

---

[8] Petitioner contends (Pet. 10) that *Graham*, together with *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985), establishes a totality-of-the-circumstances test for assessing the reasonableness of a seizure. Consistent with that analysis, the court of appeals here acknowledged that force that is actually "connected" with a seizure may be considered in evaluating its reasonableness. Pet. App. 10a n.7.

[9] Petitioner argues that "conflicting decisions about the applicability of *Hodari* to civil liability cases * * * are proliferating," Pet. 11, but fails to identify any case actually in conflict with *Hodari D.* See *Alexander* v. *City & County of San Francisco*, 29 F.3d 1355, 1365 & n.10, 1366 (9th Cir. 1994) (fatal shooting of plaintiff constituted seizure in violation of the Fourth Amendment), petition for cert. pending, No. 94-876 (filed Nov. 14, 1994);

2. With regard to petitioner's substantive due process claim, the court of appeals assumed without deciding that use of excessive force outside the context of a seizure could be challenged under substantive due process principles. Pet. App. 11a. Petitioner does not contend that the court erred in the legal standard it employed. See *id.* at 20a-21a. Petitioner's challenge to the decision is limited to a dispute about the application of that test.

Petitioner contends that the court of appeals misapplied the legal standard by holding that physical injury is a prerequisite to a Fifth Amendment claim. Pet. 12-13. The court considered physical injury as only one relevant factor, however, and did not treat its absence as dispositive. Although it observed that the Tenth Circuit had not in the past upheld an excessive force claim "without some evidence of physical injury," Pet. App. 12a, the court nonetheless considered whether the conduct described in the complaint was sufficiently egregious to violate substantive due process even in the absence of physical injury. *Id.* at 13a-15a.[10]

Mouille v. *City of Live Oak*, 977 F.2d 924, 927 (5th Cir. 1992), (officer cocking his gun, shoving it in plaintiff's neck, and threatening to blow his head off "fall[s] under the broad definition of 'seizure'" even though officer was not arresting plaintiff), cert. denied, 113 S. Ct. 2443 (1993); *McDonald* v. *Haskins*, 966 F.2d 292, 292-293 (7th Cir. 1992) (officer holding a gun to a nine-year-old innocent child's head, making it clear that he was not free to move, constituted seizure); *Yates* v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) (shooting plaintiff and rendering him paraplegic effected unreasonable seizure).

[10] The cases cited by petitioner (Pet. 12-13) are consistent with the decision below. One of those cases held that there was no constitutional violation under the circumstances. See *Conner* v. *Sticher*, 801 F.2d 1266, 1269 (11th Cir. 1986). Two of the cases found that some physical injury occurred. See *Checki* v. *Webb*, 785

Petitioner further mischaracterizes the decision of the court of appeals as holding that "the intentional use of deadly force against an innocent hostage" fails to state a claim. Pet. 13. The court expressly acknowledged that deliberately shooting an unarmed hostage may amount to a use of grossly disproportionate force in violation of the Fifth Amendment, see Pet. App. 15a (citing *Fernandez* v. *Leonard*, 784 F.2d 1209, 1214-1215 (1st Cir. 1986)), but concluded that petitioner's factual allegations did not rise to that level. Petitioner conceded that respondents were not acting with improper intent, but rather argued that their actions constituted "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience." Pet. App. 13a. The court did not view the absence of intent as dispositive, but also considered whether the force used was "grossly disproportionate" to the need presented by the alleged circumstances, ultimately concluding that it was not. *Id.* at 14a-15a. Contrary to petitioner's contention, Pet. 13-14, the court

---

F.2d 534, 536 (5th Cir. 1986) (police striking plaintiff in face with revolver caused "severe facial injuries"); *White* v. *Rochford*, 592 F.2d 381, 382 (7th Cir. 1979) (physical harm to child caused him to be hospitalized for a week). Three of the cases required particularly egregious governmental conduct that "shocks the conscience" to support a due process claim where physical injury was absent. See *Checki*, 785 F.2d at 538 (police use of vehicle to "terrorize a civilian" by "abuse of official power" that was "shocking to the conscience"); *Black* v. *Stephens*, 662 F.2d 181, 189 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (unprovoked action by police officer holding service revolver to motorist's head and threatening to shoot, with motorist's wife sitting behind him in the line of fire, was "conduct that shocks the conscience"); *White* v. *Rochford*, 592 F.2d at 383 (police officer's "unjustified and arbitrary" abandonment of three children of arrestee in a car on a busy highway on a cold evening, endangering them and causing physical and emotional injury, "shock[s] the conscience").

of appeals' approach does not conflict with any decision of any other court of appeals.[11]

3. Petitioner argues that the court of appeals erred in refusing to permit him to engage in discovery (Pet. 15), and thus made "ultimate factual determinations without the benefit of any evidentiary development of those facts." Pet. 16. The court of appeals, however, made no factual determinations; it accepted petitioner's factual allegations as true and held that the complaint failed to state a claim. That purely legal determination was a routine application of Federal Rule of Civil Procedure 12(b)(6). See *Miree* v. *DeKalb County*, 433 U.S. 25, 27 n.2 (1977) ("In reviewing the sufficiency of a complaint in the context of a motion to dismiss we, of course, treat all of

---

[11] See *Fagan* v. *City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (applying "shocks the conscience" standard to reject motorist's due process claim based on police officer's reckless pursuit of his vehicle through stop signs and red lights at high speeds in residential neighborhoods ending in motorist's fatal crash into truck); *Medina* v. *City of County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (rejecting claim of innocent bystander struck by vehicle of fleeing felon during high-speed chase because the pursuing law enforcement officers' conduct, though reckless, violated no clearly established right); *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989) (finding due process violation where plainclothes police officers, in absence of any reasonable suspicion, approached parked automobile at night with guns drawn and then shot motorist in the back when he started to drive away, leaving him permanently paraplegic); *Fernandez* v. *Leonard*, 784 F.2d at 1213-1214, 1215 (applying "shocks the conscience" standard to hold that evidence that police deliberately repeatedly shot an innocent hostage who never threatened the police or anyone else precluded summary judgment in favor or police); *Grandstaff* v. *City of Borger*, 767 F.2d 161, 166 (5th Cir. 1985) (sustaining claims against police who "maliciously, wantonly, or oppressively" mistook an innocent resident for a fugitive and shot him to death), cert. denied, 480 U.S. 916 (1987).

the well-pleaded allegations of the complaint as true."). This Court has repeatedly endorsed disposition of claims on the pleadings, where possible, in qualified immunity cases. See *Siegert* v. *Gilley*, 500 U.S. 226 (1991); *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978); see also *Elder* v. *Holloway*, 114 S. Ct. 1019, 1023 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys

DECEMBER 1994